SUPREME COURT, U.S.
AUG 25 1993
OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

DEREK SMITH, PATRICK O'CONNOR,
LUKE MARONE, KRISTI HANDLER,
ELIZABETH BAIRD, NICOLE RICHARDS,
PATRICK V. GIBBONS, FRANCES GIBBONS,
FRANCIS McMANUS, MARK J. FARLEY,
GARY J. FARLEY, ANNA FISHER,
Petitioners

v.

LOWER MERION TOWNSHIP,
Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Michael J. Malloy, Esquire
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Media, PA 19063
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August 24, 1993

QUESTIONS PRESENTED FOR REVIEW

1. Whether Lower Merion Township Ordinance No. 3199, the Student Housing Ordinance, violates the Equal Protection Clause of the United States Constitution because "students" require a special exception to live together in "student homes" when other, non-"student" individuals are permitted to live together without government interference.

2. Whether Lower Merion Township Ordinance No. 3199, the Student Housing Ordinance, violates the Equal Protection Clause of the United States Constitution because the distinctions and classifications which the Ordinance draws are not rationally related to the Township's stated, legitimate goal.

LIST OF PARTIES

The parties to the proceedings below were Petitioners, Derek Smith, Patrick O'Connor, Luke Marone, Kristi Handler, Elizabeth Baird, Nicole Richards, Patrick V. Gibbons, Frances Gibbons, Francis McManus, Mark J. Farley, Gary J. Farley and Anna Fisher. Respondent, Lower Merion Township was defendant-appellee below.

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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1992

DEREK SMITH, PATRICK O'CONNOR, LUKE MARONE, KRISTI HANDLER, ELIZABETH BAIRD, NICOLE RICHARDS, PATRICK V. GIBBONS, FRANCES GIBBONS, FRANCIS McMANUS, MARK J. FARLEY, GARY J. FARLEY, ANNA FISHER,
Petitioners

vs.

LOWER MERION TOWNSHIP,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioners respectfully request that a Writ of Certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered on May 27, 1993.

OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third

Circuit is set forth in full in the Appendix at page App. 1 of this Petition.

The Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania is set forth in full in the Appendix at page App. 4 of this Petition.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 27, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment Fourteen, which provides:

> All person born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 42 U.S.C. §1983, which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia.

3. Lower Merion Township Ordinance No. 3199, which is set forth in full in the Appendix at App. 23 of this Petition.

STATEMENT OF THE CASE

This case presents an important issue regarding the ability of a municipality to use its police power of zoning to restrict the residence of a politically unpopular group of individuals, when other, similarly situated individuals are not so restricted.

On July 19, 1990, the Township of Lower Merion, Pennsylvania ("the Township") enacted Ordinance No. 3199 ("the Ordinance") which amended the Township's Zoning Ordinance.

The Ordinance permitted "student homes" to be located in residential areas only if permitted by a special exception. A "student home" was defined by the Ordinance as:

> A living arrangement for students, unrelated by blood, marriage or legal adoption, attending or about to attend a college or university or who are on a semester or summer break from studies at a college or university, or any

combination of such persons. Student homes shall not include fraternities, sororities or community residential programs.

See Ordinance, §1, (App. 26). "Student" is not defined by the Ordinance.

Under the Ordinance, a "student" may not reside with another non-related "student" unless their "student home" obtained a special exception. Pursuant to the Ordinance, a special exception may be obtained for a "student home" only if the residence houses "no more than three (3) students" and is "located in a dwelling with a floor area of at least on thousand five hundred (1500) square feet, exclusive of basements, garages and accessory buildings." A "student home" is not permitted if located within five hundred (500) feet of another "student home" or other "residential use" as defined by the Ordinance, except in R-7 areas. "student

homes" are not permitted in structures designed as townhouses. See, Ordinance §3 (p.14a). Finally, a "student home" must have three (3) off-street parking spaces for each "student home" occupying a premises. See, Ordinance §4 (App. 32).

The Petitioners herein are various university students who rent residential accommodations in the Township and, also, various landlords who rent living accommodations to university students in the Township. These students and landlords have been cited for violating the Ordinance.

On November 27, 1990, Petitioners filed a Complaint in the United States District Court for the Eastern District of Pennsylvania alleging that the terms of the Ordinance, as well as the manner of its enforcement, violated their Civil Rights

under the Equal Protection and Due Process Clauses of the United States Constitution.[1]

These Constitutional claims were brought pursuant to 42 U.S.C. §1983. They sought injunctive relief, compensatory damages, punitive damages, and attorneys' fees.[2]

Petitioners later sought certification as a class of those students and landlords aggrieved by the Ordinance. By Order of October 3, 1991, the Honorable Robert S. Gawthrop, III, refused to certify the class proposed by the aggrieved individuals.

Cross Motions for Summary Judgment were subsequently filed by the parties and,

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[1]Petitioners also alleged a violation of their Right to Travel, the Fair Housing Act, and conspiracy to violate all these rights. These claims were all withdrawn or dismissed.

[2]The claim for punitive damages was eventually dismissed.

on May 7, 1992, Judge Gawthrop granted Summary Judgment to the Township. See, Memorandum and Order, App. 4).

The Petitioners filed a timely appeal to the United States Circuit Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1291. Oral argument was heard before a three judge panel on May 19, 1993 and, on May 27, 1993, the Order of the District Court was affirmed by the Judgment Order of Circuit Judge Seitz. (See, Judgment Order, App 1).

ARGUMENT FOR GRANTING THE WRIT

This case presents an important issue to the Court regarding the ability of a municipality to use its police power of zoning to restrict the residency in their town of a politically unpopular group of individuals, namely, college "students."

It is yet another step down the "slippery slope" of land use cases wherein a municipality attempts to use its Zoning Ordinance to exclude politically unpopular persons. Petitioners believe that the Court should, as it did in the cases of City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432 (1985) and Moore v. City of East Cleveland, 431 U.S. 94 (1977), overturn a Zoning Ordinance when it seeks to control too harshly who may, and who may not, live together.

An equally important issue for this Court to address is how the rational basis standard of review should be applied to the Petitioners' Equal Protection Claim and others like it. In the Cleburne decision, the Court, in using the rational basis standard of review to analyze the plaintiff's Equal Protection Claim, clearly

applied a more active or exacting rational basis analysis that had been traditionally used previously. However, the Court also very clearly declined to place handicapped persons in a "quasi-suspect" class and declined to enunciate any type of heightened scrutiny in such cases. Cleburne, 473 U.S. at 446. Since the Cleburne decision, some Courts have adopted this more "active", "exacting" or "searching" rational basis standard while others have not.

The Third Circuit Court of Appeals declined, in adopting the Memorandum of the District Court, to utilize this Cleburne review in this case. This, despite the fact the Third Circuit had apparently already utilized and adopted it in a

previous case.[3]

The fear of Justice Marshall (who was joined by Justices Brennan and Blackmun, concurring in part and dissenting in part in Cleburne), that:

> ...by failing to articulate the factors that justify today's "second order" rational-basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked. Lower Courts are thus left in the dark on this important question, and this Court remains unaccountable for its decisions employing, or refusing to employ, particularly searching scrutiny.

473 U.S. at 460, has apparently been realized, at least in the Third Circuit Court of Appeals and the District Court for the Eastern District of Pennsylvania.

It is the Petitioners' argument that the Court need not extend or enlarge the

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[3]See, Sullivan v. City of Pittsburgh, Pennsylvania, 811 F.2d 171, 184 (3rd. Cir., 1987).

sphere of cases to which the Cleburne rational basis analysis applies in order for Petitioners' claim to be so analyzed. It is the Petitioners' belief that this analysis applies to all cases wherein legislation is challenged as denying the equal protection of the laws.

I. THE RATIONAL REVIEW STANDARD UTILIZED IN CLEBURNE IS THE PROPER REVIEW STANDARD TO BE UTILIZED IN DECIDING THIS CASE.

The Petitioners do not make any claim, nor did they in the lower courts, that their claim deserved any type of heightened scrutiny. The Petitioners have always known and argued that the rational basis standard of review applies to their case. Where the Petitioners take issue with the lower courts is whether or not those courts correctly applied the rational basis standard of review, most recently applied by this Court in City of Cleburne, Texas v.

Cleburne Living Center, supra, which now requires a more exacting or searching analysis. In Cleburne, the Court stated the general rule that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. 473 U.S. at 440. The Court also stated that the state may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. 473 U.S. at 446. The Court then extended its analysis, in determining whether or not the classification drawn was rationally related, to decide whether those included in the classification (the mentally retarded) who would live in the home would threaten legitimate interests of the city in a way that other permitted uses, such as

boarding houses and hospitals would not. The Court in Cleburne concluded that there was no rational basis for believing that the home for the mentally retarded posed any special threat to the city's legitimate interests, therefore, holding the Ordinance invalid. It is this further "search" into whether or not the classifications drawn by the Ordinance ("students" and "student homes") are rationally related to the Township's legitimate purposes which Petitioners seek.

The Cleburne analysis has been adopted and utilized in many circuits and district courts. See, Sullivan v. City of Pittsburgh, Pennsylvania, 811 F.2d 171 (3d. Cir., 1987); Brennan v. Stewart, 834 F.2d 1248 (5th Cir., 1988); Bannum, Inc. v. City of Louisville, Kentucky, 958 F.2d 1354 (6th Cir., 1992); Cornerstone Bible Church v.

City of Hastings, 948 F.2d 464 (8th Cir., 1991); Executive 100, Inc. v. Martin County, 922 F.2d 1536 (11th Cir., 1991); Alamo Rent-A-Car v. Sarasota-Manatee Airport Authority, 825 F.2d 367 (11th Cir., 1987); Burstyn v. City of Miami Beach; 663 F.Supp. 528 (S.D. Fla., 1987); Love Church v. City of Evanston, 671 F.Supp. 515 (N.D. Ill. 1987); Cohen v. City of Des Plaines, 742 F.Supp. 458 (N.D. Ill. 1990). The wide acceptance of this more searching analysis, drawn from this Court, mandates that it be used in analyzing Petitioners' claim.

The District Court and the Circuit Court of Appeals, in adopting the District Court's Memorandum, failed to apply the rational basis review correctly. Judge Gawthrop in his Memorandum, when analyzing the Petitioners' argument for the use of the Cleburne review, recognized that

Cleburne dealt with the mentally retarded and in this case, "there is no showing that college students generally, or those attending local colleges in particular, are members of a class toward which society has been, historically or irrationally, prejudiced." Judge Gawthrop thus concluded that, "the precondition for heightened scrutiny is not met." See, App. 14. The Petitioners believe that Judge Gawthrop erred in deciding that any preconditions of previous prejudice are necessary for the Cleburne review to be utilized.

Judge Gawthrop used the extremely lenient standard outlined in United States v. Carolene Products Co., 304 U.S. 144 (1938), that if a legislative determination is "at least debatable," the court should uphold it. He concluded that, "The means and ends of the Township's Zoning

Ordinance, although troubling in certain respects, are "at least debatable" in the language of Carolene. See, App. 16, 17, and thus upheld the Ordinance. The Petitioners argue that since Cleburne, governments are asked to be more accountable for the goals and means of their laws than just showing they are "debatable."

II. AN ANALYSIS OF THE ORDINANCE UTILIZING THE CLEBURNE RATIONAL BASIS ANALYSIS SHOULD LEAD THIS COURT TO CONCLUDE THAT THE ORDINANCE VIOLATES THE PETITIONERS' RIGHT OF EQUAL PROTECTION OF THE LAWS.

The issue in the present case must mirror that of Cleburne and its progeny: may the Township require a special exception for "students" to live together in "student homes" when other, non-"student" individuals are permitted to live together without government interference?

The petitioners believe that this Court would find that there is not any legitimate reason to distinguish between two, non-related students who live together and two, non-related nurses, two plumbers, two lawyers, two "bikers", or two of any other type occupation.

The Township would argue that it drew its "student" distinction because it received complaints from local residents about "student homes" and students' activities, including making noise late at night, urinating on lawns and bushes and monopolizing the available parking spaces on the streets. The Township has assumed that "students" as a group are more vulgar, louder and more violent than other types of persons. Nevertheless, when the Township canvassed the affected neighborhoods to determine the extent of the perceived

problem during its "Community Harmony Program," only about 5% of those residents requested had any specific problems with students or student residences. The remainder of the residents expressed no ill feelings towards the students and, indeed, 5% of them stated that the students were an asset to the community. This empirical data was ignored by the Committee charged with drafting the Ordinance. The Township Commissioner who was Chairman of that Committee, in deposition testimony, frankly admitted that the sole basis for the enactment of the Ordinance was the "vociferous" complaints of certain residents and that, if no complaints had been received, no Ordinance would have been adopted. The deposition of one local resident who played a prominent and vocal role during the Ordinance adoption process

magnified the Township's irrational basis for distinguishing "students" from others. His problem with "students" and "student houses" in his neighborhood was that the lifestyle of students differs from the lifestyle of a "typical resident" of the neighborhood, and that he would have no problems with having students in his neighborhood as long as those students shared his values.

The irrationality of distinguishing between students and other non-related renters can best be shown by hypothetical example. The situation may exist where a landlord owns attached twin homes in a residential district of the townships and rents each home to two sets of tenants. One of the homes is rented to three, twenty year old persons who are classified by the Township as "students", while the other

home is leased to three plumbers of the same age. The outward appearances of the homes is the same and both are maintained by the landlords.

Even though neither group of tenants causes any more neighborhood disruptions or traffic problems than the other, the Ordinance would require that the students be evicted if they do not obtain a special exception. Indeed, even if the students cause absolutely no problem and the plumbers require a police presence every Friday night, the Ordinance would require the students to be evicted and permit the plumbers to stay.

The Township would argue that the draconian measure of banning "student homes" from residential districts is necessary to maintain their admittedly legitimate government goal of maintaining

peaceful, residential neighborhoods. The Petitioners do not deny that the stated goal is legitimate, however, it is simply not rational to single out "students" for treatment which is different from that given to other, non-student renters. To do so is to violate the mandate of Cleburne since students do not threaten legitimate interests of the Township in a way that other permitted uses would not.

The irrationality of the Ordinance can also be seen in the example where individuals, prohibited from living together while "students", either drop out or graduate. Once this happens, they are now permitted to reside together even though, presumably their "values" or anit-social behavior have not changed overnight, and they still take up the same amount of parking spaces. This change in

classification of the individual has no affect whatsoever on the Township's goal of maintaining the neighborhood.

The Petitioners are left to believe, and would argue to the Court, that the basis for the Ordinance was the unsubstantiated fears and prejudices of the neighborhood because of the isolated, rowdy behavior of some "students." However, objectives such as a bare desire to harm a politically unpopular group are not legitimate state interest. Cleburne, 473 U.S. at 447. Mere negative attitudes, or fear unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible basis for the classification drawn. Id. at 448.

CONCLUSION

For all of the above-stated reasons,

this Court should grant Petitioners' Writ of Certiorari.

Respectfully submitted,

MICHAEL J. MALLOY, ESQUIRE
Attorney for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1717

DEREK SMITH, PATRICK O'CONNOR, LUKE MARONE, KRISTI HANDLER, ELIZABETH BAIRD, NICOLE RICHARDS, PATRICK V. GIBBONS, FRANCES GIBBONS, FRANCIS A. McMANUS, MARK J. FARLEY, GARY J. FARLEY, ANNA FISCHER, THOMAS PIERSALL, FRANCIS PEZZI, ANTHONY MISELLI, Individually and for all similarly situated individuals

DEREK SMITH, PATRICK O'CONNOR, LUKE MARONE, KRISTI HANDLER, ELIZABETH BAIRD, NICOLE RICHARDS, PATRICK V. GIBBONS, FRANCES GIBBONS, FRANCIS A. McMANUS, MARK J. FARLEY, GARY J. FARLEY and ANNA FISHER, Individually and for all similarly situated individuals,

APPELLANTS

v.

LOWER MERION TOWNSHIP

Appeal from the United States District Court for the Eastern District of Pennsylvania
(Civil Action No. 90-07501)

District Judge: Honorable Robert S. Gawthrop, III

Argued May 19, 1993

BEFORE: STAPLETON, ALITO and
SEITZ, Circuit Judges.

JUDGMENT ORDER

Plaintiffs appeal from the order of the district court granting defendant summary judgment.

Essentially for the reasons given in the Memorandum of the district court dated May 7, 1992, and in particular because the court believes the rational basis standard is applicable here and supports, in part, the legitimate desire of the defendant to protect the residential character of the neighborhood by enacting the ordinance in dispute, it is

ADJUDGED and ORDERED that the order of the district court be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT:

_____
Circuit Judge

ATTEST:

_____
P. Douglas Sisk
Clerk

Dated: May 27, 1993

Costs taxed in favor of the appellee as follows:

Brief.....$150.50

Certified as a true copy and issued in lieu of a formal mandate on June 18, 1993

Teste: _____

Clerk, United States Court of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DEREK SMITH, PATRICK O'CONNOR, LUKE MARONE, KRISTI HANDLER, ELIZABETH BAIRD, NICOLE RICHARDS, PATRICK V. GIBBONS, FRANCIS GIBBONS FRANCIS GIBBONS, FRANCIS A. McMANUS MARK J. FARLEY, GARY J. FARLEY, ANNA FISHER, Plaintiffs	:	CIVIL ACT
v.	:	
LOWER MERION TOWNSHIP Defendant	:	NO. 90-750

Gawthrop, J. May 7th, 1992

MEMORANDUM AND ORDER

Plaintiffs Mark J. and Gary J. Farley, owners of rental property in defendant township, have filed for a preliminary injunction and temporary restraining order, in this case challenging to the constitutionality of a zoning ordinance restricting rentals to students. Also pending before the court, are the parties'

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cross-motions for summary judgment, with extensive documentation, which they incorporated into their briefs and during the hearing and argument on the Farleys' motion for a preliminary injunction.

BACKGROUND

In 1988, the Board of Commissioners of Lower Merion Township, Montgomery County, established a Residential Preservation Committee. The Committee held public meetings on preservation of the residential character of the community, during which citizens complained about the disruption caused by the student tenants in the township. The residents raised familiar town-and-gown problems: excessive noise, partying in the evening and early-morning hours, inadequate on-street parking, unsafe and drunk driving, underage drinking, urinating and vomiting in public, profuse littering. (Def.Mot. for Sum.J. at 3-4).

Residents were also upset that landlord-investors were buying up properties to rent to students, thus driving up property values, pricing middle-class families out of the local housing market, and changing the character of their community. (Id., at 4).

After holding hearings and considering the findings of the Residential Preservation Committee, the testimony of students, professors and township residents, the police records on student housing problems, information from the Zoning Enforcement Officer, complaints from their individual constituents, and the Commissioners' personal experience, (Id. at 6), the Board of Commissioners, on February 15, 1989, adopted an ordinance, amended on July 19, 1990, which, in essence, prohibits renting a property to a group of more than three students in a residential zoning

district without a special exception from the zoning board.[1] Excluded are

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[1]Ordinance No. 3199 reads in pertinent part: "An ordinance to amend the code of the Township of Lower Merion by redefining the terms, Family, Community Residential Program and Student Home by redefining the term "group home" as a Community Residential Program...

§1. STUDENT HOME - A living arrangement for students, unrelated by blood, marriage or legal adoption, attending or about to attend a college or university or who are on a semester or summer break from studies a [sic] college or university, or any combination of such persons. Student homes shall not include fraternities, sororities, or community residential programs.
§3. Zoning, Article IV. RAA Residence Districts §155-11, Use Regulations, shall be amended by adding thereto new subsections Q through U to read as follows:

S. The following uses when authorized as a special exception:

...

(5) Student home for no more than three (3) students located in a dwelling with a floor area of at least one thousand five hundred (1500) square feet, exclusive of basements, garages, and accessory buildings. A special exception authorizing a student home shall expire without further action by the Township unless the use is registered in conformity with Title 92 of the

fraternities, sororities, community residential programs, and students who are related by consanguinity or affinity.

The plaintiffs assert that the ordinance violates their constitutional rights to due process and equal protection, under the Fourteenth Amendment to the Constitution, thus falling under the

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Lower Merion Code.

T. No residential use authorized under subsections Q, R or S above shall be permitted if another residential use listed in those subsections is located in any Residential Zoning District except R-7 ... Student homes shall also be subject to the spacing provisions of 155-141.3.

U. In districts which have more than a single set of area and width regulations, community residential programs and student homes shall meet the area and width regulations for single-family dwellings, except that student homes are not permitted in structures designed as townhouses.

W. Student homes three (3) parking spaces for each student home occupying a premises.

statutory aegis of 42 U.S.C. §1983 and the Fair Housing Act, 42 U.S.C. §3601, et seq.

The Farleys, who now seek a preliminary injunction, allege that to comply with the ordinance, they have been forced to turn away prospective student-tenants and have, after diligent effort, be unable to find other tenants. They assert that the ordinance has caused irreparable harm to their rental business that is quickly bringing them to financial ruin; they have fallen behind in their mortgage payments; their credit rating has eroded; they have sold some of their holdings and refinanced their own homes; they say that they may even face bankruptcy because of the restrictions the township has placed on the rental properties. (Pl.Mot. for Prelim.Inj.)

These past and imminent harms to plaintiffs are considerable indeed. A

preliminary injunction, however, is an extraordinary remedy, not to be granted lightly.

DISCUSSION

An injunction may only be granted if plaintiff can demonstrate (1) a reasonable probability of eventual success in the litigation, (2) irreparably harm if relief is not granted pendente lite; taking into account (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest. Chez Sez III Corp. v. Township of Union, 945 F.2d 628, 634 (3d Cir. 1991).

Likelihood of Success on the Merits

When a federal court sits in judgment of a local municipality's legislative act, it owes the municipality a certain amount of deference in its determination of local needs and preferences. Minnesota v. Clover

Leaf Creamery Co., 449 U.S. 456, 469 (1981). Thus, these legislative acts enjoy a "presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." Hodel v. Indiana, 452 U.S. 314, 331-332 (1981). This is a difficult presumption to overcome.

Zoning ordinances are to be upheld unless they are "clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals of general welfare." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 385 (1926). The Supreme Court has further articulated the legitimate purposes of zoning ordinances, holding that "[t]he preservation of the character and integrity of single-family neighborhoods, prevention of undue concentration of population, prevention of traffic congestion and

maintenance of property values are all legitimate purposes of planning and zoning." Village of Belle Terre v. Borras, 416 U.S. 1, 9 (1974). The Lower Merion Zoning ordinance seeks to maintain the residential character of the community, to cut down on noise and congestion, an to maintain property values. Thus, defendants have articulated a constitutionally permissible purpose, similar to that upheld in Belle Terre.

What remains to be answered is whether the ordinance is rationally related to that end, whether the ordinance impermissible burdens any of plaintiffs' fundamental constitutional rights, and whether the ordinance is so vague as to violate due process.

a. Standard or Review - Rationality

Plaintiffs argue that the ordinance discriminates against students, in

violation the equal protection clause, and thus, that the ordinance should be subject to a more demanding standard of review. Not every discriminatory classification, however, is a violation of the equal protection clause. Only discrimination based on a limited, well recognized set of suspect classifications triggers heightened scrutiny. The parties agree that the Supreme Court has not recognized college students as a suspect classification.

Plaintiffs, nevertheless, urge some form of heightened-scrutiny review, relying upon City of Cleburne v. Cleburne Living Center, 473 U.S. 432-439 (1985). There, the Supreme Court, although concluding that a classification based on the attribute of mental retardation is not suspect, did say that because of the past and continuing prejudice in our society toward the mentally retarded, the city's zoning

ordinance, which discriminated against the mentally retarded, warranted heightened scrutiny. Here, there is no showing that college students generally, or those attending local colleges in particular, are members of a class toward which society has been, historically or irrationally, prejudices. Thus, the precondition for heightened scrutiny is not met.

Nor have plaintiffs been able to show that this zoning ordinance would unconstitutionally burden a specific liberty interest, recognized for protection under the due process clause of the Fourteenth Amendment. Thus, the ordinance is not subject to heightened scrutiny for unconstitutionally burdening the plaintiffs' rights.

Since there is no basis for heightened scrutiny under either the equal protection or the due process clauses, the ordinance

is subject to rationality review.

Rationality review is "lenient." Exxon Corporation v. Eagerton, 462 U.S. 176, 195 (1983). An ordinance must be upheld if facts "reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426 (1961). Here, facts can not only be conceived to justify the ordinance, the Township sought and compiled such facts, by conducting fact-finding meetings, holding hearings, and giving students, residents, and landlords an opportunity to be heard. The Township's investigation of the complaints showed that large concentrations of student-tenants do, in fact, change the character of the neighborhood and cause traffic and parking problems, in ways that other smaller groups of tenants with less free time and different social customs do not. Thus, the defendant says, it was rational to

restrict, without not totally eliminating, the areas where students could rent housing in the Township.

If a legislative determination is "at least debatable," the court should uphold it. United States v. Carolene Products Co., 304 U.S. 144, 153-54 (1938). The Township's experience and investigation showed that the student-tenants were changing the character of the community and undermining the general welfare of the Township. The township was well aware of the economic hardships to landlords and inconvenience to students, primarily from Villanova University, where on-campus housing is scarce. (Board of Commissioners, Lower Merion Township, Three Public Hearings, June 20, 1990, at 23, 36, 56, 73, 85, 98, 101.). It nevertheless decided to regulate the location of student rental properties. The means and ends of

the Township's zoning ordinance, although troubling in certain respects, are "at least debatable" in the language of Carolene, supra. Concededly, that is not the most stringent of standards. But that is the standard and has been for well over a half century. It has here been met. A district court may not substitute its own judgment as to the wisdom or utility of a legislative purpose for that of local legislatures. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 469 (1981). I am, thus, constrained to conclude that the ordinance is rationally related to a legitimate government interest.

b. Vagueness

Plaintiffs challenge the ordinance on another ground as well: vagueness. Specifically, they assert that it is impermissible vague in the broad spectrum of potentially included people, who may be

happening to be studying something, and are thus students. Where no suspect class or fundamental right is encumbered, economic regulations, such as zoning ordinances, need not be narrowly tailored. Papachristou v. City of Jacksonville, 405 U.S. 156, 162; Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982). To succumb to a facial challenge to its constitutionality, the ordinance must be "incapable of any valid application." Here, admittedly, the application of the ordinance in close cases could cause some problems of interpretation. For example, a group of three unrelated adults, working full-time during the day and attending law school at night, or some other adult night school at the local community college for a couple of hours a week, could be seen as falling within an uncertain gray area. But as

applied to the plaintiffs at bar, this problem of interpretation has not arisen. All the student-tenants at the time the suits was instituted were attending college full-time. (Dep. D. Smith at 5, O'Connor at 5-7; Handler at 6-8; Baird at 4-5; Marrone 4-14; 36; Richards 7-11; P. Gibbons at 23-26, 61-62; M. Farley at 19-20). The statute is not so vague as to have no valid application. The statute is not so vague as to have no valid application. The statute is directed at those whose primary occupation is student and aimed primarily at students enrolled full-time at Villanova University, with which Township officials had numerous meetings to address the problem of student housing. (Dep. Drayer, at 34; Manko, at 19). The word "student," when construed in its ordinary meaning and in light of the legislative history, beyond consistent interpretation. (See Board of

Commissioners, Lower Merion township, Three Public Hearings, June 20, 1990, at 101, 121; Dep. Drayer, at 34; Dep. Duncan, at 19). Thus, the ordinance is not void for vagueness on its face or as applied.

CONCLUSION

Because the zoning ordinance has withstood plaintiffs' challenges to its constitutionality, plaintiffs do not have a reasonable probability of succeeding on the merits. Therefore, plaintiffs' motion for preliminary injunction must be denied. In addition, since, as a matter of constitutional law, I have concluded that plaintiffs' challenges cannot succeed, I shall also grant summary judgment to defendant.

An order follows

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DEREK SMITH, PATRICK O'CONNOR, LUKE MARONE, KRISTI HANDLER, ELIZABETH BAIRD, NICOLE RICHARDS, PATRICK V. GIBBONS, FRANCIS GIBBONS FRANCIS GIBBONS, FRANCIS A. McMANUS MARK J. FARLEY, GARY J. FARLEY, ANNA FISHER, Plaintiffs	:	CIVIL ACTION
v.	:	
LOWER MERION TOWNSHIP Defendant	:	NO. 90-7501

ORDER

AND NOW, this 7th day of May, 1992, upon consideration of Plaintiffs' Mark and Gary Farleys' Motion for Preliminary Injunction and Temporary Restraining Order, and the response thereto, and after hearing and argument in open court, it is ORDERED that Plaintiffs' motion is DENIED;

IT IS FURTHER ORDERED, upon consideration of the parties' Cross-Motions

for Summary Judgment, under Fed.R.Civ.P., 56(c), and the responses thereto, that summary judgment is GRANTED for the defendant;

IT IS FURTHER ORDERED, that defendant's Motion to Strike Expert Report, and plaintiff's Motion to Strike Motion for Summary Judgment (Docket Item No. 52) are DENIED as MOOT.

BY THE COURT:

_____

Robert S. Gawthrop, III J.

AN ORDINANCE
NO. 3199

AN ORDINANCE TO AMEND the Code of the Township of Lower Merion by redefining the terms Family, Community Residential Program and Student Home by redefining the term "group home" as a Community Residential Program; by providing for Community Residential Programs in Residence Districts; by imposing uniform separation requirements on the following uses permitted in Residence Districts, except the R-7 Residential Zoning District: community residential program, alternative housing options for the elderly, club or lodge, fraternity or sorority, private educational institution, religious use, student home, home daycare; by altering parking requirements for uses including non-recreational club or lodge, fraternity, sorority, community residential program,

convalescent home, nursing home and home for the aged, and deleting provisions inconsistent with the above.

The Board of Commissioners of the Township of Lower Merion hereby ordains:

Section 1. The Code of the Township of Lower Merion, Chapter 155 thereof, entitled Zoning, Section 155-4(B), Definitions, the definition of Family, Group Home and Student Home, shall be amended to provide as follows:

> FAMILY - Any number of individuals living and cooking together as a single housekeeping unit, including not more than three (3) unrelated individuals. The term "unrelated individual" shall include any individual who is unrelated by blood, marriage or legal adoption to any other individual in the unit, but it

excludes domestic servants and minor foster children. The term "family" shall include a community residential program for not more than three (3) unrelated individuals, but shall not include a student home.

COMMUNITY RESIDENTIAL PROGRAM - An establishment, sometimes referred to as a community living arrangement or a group home, licensed by the Commonwealth of Pennsylvania, that provides a home for not more than eight (8) - handicapped individuals, excluding staff who do not reside on the property, who live and cook together as a single housekeeping unit. This definition shall not include a facility housing persons released from or under the jurisdiction of a government bureau of

corrections or similar institution.

"Handicapped" means, with respect to a person:

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

(2) a record of having such an impairment, or

(3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act [21 U.S.C 802]).

STUDENT HOME - A living arrangement for students, unrelated by blood, marriage or legal adoption, attending or about to attend a college or university or who are on a semester or

summer break from studies a college or university, or any combination of such persons. Student homes shall not include fraternities, sororities or community residential programs.

Section 2. The Code of the Township of Lower Merion, Chapter 155 thereof, entitled Zoning, Article IV, RAA Residence Districts, §155-11, Use Regulations, Subsections D, F, M, O and P are repealed in their entirety.

Section 3. The Code of the Township of Lower Merion, Chapter 155 thereof, entitled Zoning, Article IV, RAA Residence Districts, §155-11, Use Regulations, shall be amended by adding thereto new subsections Q through U to read as follows:

Q. Community Residential Program.

R. Alternative housing options for the elderly when authorized as a special exception in accordance

with Article XXX of this chapter.

S. The following uses when authorized as a special exception:

(1) Club or lodge

(2) Fraternity or sorority

(3) Private educational institution

(4) Religious use or Hospital

(5) Student home for no more than three (3) students located in a dwelling with a floor area of at least one thousand five hundred (1500) square feet, exclusive of basements, garages and accessory buildings. A special exception authorizing a student home shall expire without further action by the township unless the use is registered in conformity with Title 92 of the Lower Merion

Code.

(6) Family day-care for no more than six (6) nonresident children (excluding children related to the caretaker by blood, marriage or legal adoption who live in the home) located in a single-family, detached dwelling in which the care-giver resides subject to the following additional requirements:

(i) No person except the resident care-giver (or an employee who the care-giver is required by law to have on the premises) shall work on the premises in connection with the use.

(ii) In no case shall family day-care be permitted on a lot with an area of less than ten thousand (10,000) square feet.

(iii) There shall be a minimum of forty (40) square feet of floor area per child, inclusive of the space occupied by furnishings and equipment but exclusive of closets, halls, bath rooms, kitchens and related areas, which shall be on the first floor of the dwelling.

(iv) A minimum of one hundred (100) square feet of outdoor play space per child shall be available on the same lot. Such play space shall be on the rear half of the lot, enclosed by a fence or wall and no less than 30 feet from any adjacent residential building.

(v) a driveway shall be required in order to allow off-street pick up and drop off of children.

T. No residential use authorized under subsections Q, R or S above shall be permitted if any other residential use listed in those subsections is located in any Residential Zoning District except R-7 and within 500 feet, measured by the shortest distance between the lot on which the proposed use will be located and the lot or lots which contain the existing use. Family day-care shall be considered a residential use. Student homes shall also be subject to the spacing provisions of Section 155-141.3.

U. In districts which have more than a single set of area and width regulations, community residential programs and student homes shall meet the area and width regulations for single-family dwellings, except that student homes are not permitted in structures designed as townhouses.

V. It is the intent of this Section

to make reasonable accommodations in the rules, policies and practices within this Township to afford all handicapped persons equal opportunity to use and enjoy a dwelling in satisfaction of the requirements of the Fair Housing Act (42 USCS §§3601, et. seq.) as amended. No provision of this Article shall require that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

Section 4. The Code of the Township of Lower merion, Chapter 155 thereof, entitled Zoning, Article XX, Off-street parking facilities, §155-95, Facilities required, shall be amended by the addition of subsection (V) and (W) to read as follows:

V. Non-recreational club or lodge, fraternity or sorority, convalescent home, nursing home or home for the aged: at least one (1) parking space for each seven hundred fifty (750) square feet of gross floor area or fraction thereof, exclusive of basements if not devoted to the use of patrons or residents.

W. Student homes three (3) parking spaces for each student home occupying a premises.

X. Community residential programs: at least two (2) parking spaces for each community residential program occupying a premises.

Section 5. The Code of the Township of Lower merion, Chapter 155 thereof, entitled Zoning, Article XXV, General Regulations, §155-133, Conversion of dwellings, subsection B thereof shall be amended in relevant part to read as

follows:

B. The Zoning Hearing Board may authorize as a special exception the conversation of a dwelling into a use described in §155-11 S (1), (2), (3) and (4) of this chapter, but only when the proposed use complies with the applicable requirements of this chapter and with the following requirements, which are in addition to the criteria and requirements set forth in §155-114 of this chapter:

* * * * * * * * * * *

* * * * * * * * *

Section 6. The Code of the Township of Lower Merion, Chapter 155 thereof, entitled Zoning, Article XXX, Alternative Housing Options for the Elderly, Section 155-176, Specialized conversions,

subsection E and Section 155-177, Restricted accessory apartment, subsection F, shall be deleted and section 155-178, Group shared residences for the elderly, subsection G, shall be amended to read henceforth as follows:

§155-178 Group shared residences for the elderly.

G. A group shared residence for the elderly shall not be located near incompatible uses, such as heavy commercial or industrial areas.

Section 7. Nothing in this Ordinance or in Chapter 155 of the Code of the township of Lower Merion, as hereby amended, shall be construed to affect any suit or proceeding in any court, any rights acquired, or liability incurred, any permit issued, or any cause or causes of action existing under the said Chapter 155 prior

to the adoption of this amendment.

Section 8. The provisions of this Ordinance are severable, and if any section, sentence, clause, part, or provision thereof shall be held illegal, invalid, or unconstitutional by any court of competent jurisdiction, such decision of the court shall not affect or impair the remaining sections, sentences, clauses, parts or provisions of this Ordinance. It is hereby declared to be the intent of the Board that this Ordinance would have been adopted if such illegal, invalid, or unconstitutional section, sentence, clause, part, or provision had not been included herein.

Section 9. This Ordinance shall take effect and be in force from and after its approval as required by law.

Enacted into an Ordinance this 18th day of July, 1990.

TOWNSHIP OF LOWER MERION

_____

Charles F. Ward, President

ATTEST:

_____

Eileen R. Trainer, Secretary

Supreme Court, U.S.
FILED
OCT 12 1993
OFFICE OF THE CLERK

No. 93-394

In The

Supreme Court of the United States

October Term, 1993

DEREK SMITH, PATRICK O'CONNOR, LUKE MARONE, KRISTI HANDLER, ELIZABETH BAIRD, NICOLE RICHARDS, PATRICK V. GIBBONS, FRANCES GIBBONS, FRANCIS A. McMANUS, MARK J. FARLEY, GARY J. FARLEY, ANNA FISCHER,

Petitioners,

vs.

LOWER MERION TOWNSHIP,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the district court and court of appeals properly determined that petitioners' claims were subject to rational relationship review where petitioners failed to establish that they were members of a group toward which society had been historically or irrationally prejudiced?

2. Whether the district court and court of appeals properly determined that Lower Merion Township's Ordinance No. 3199 is rationally related to a legitimate government interest and thus sufficient to withstand an equal protection challenge?

LIST OF PARTIES

Petitioners in this action are either full-time students or landlords. The student petitioners are: Derek Smith, Patrick O'Connor, Luke Marone, Kristi Handler, Elizabeth Baird and Nicole Richards. The landlord petitioners are: Patrick Gibbons, Frances Gibbons, Francis McManus, Mark J. Farley, Gary J. Farley and Anna Fisher. The only respondent is Lower Merion Township.

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No. 93-394

In the

Supreme Court of the United States

October Term, 1993

DEREK SMITH, PATRICK O'CONNOR, LUKE MARONE, KRISTI HANDLER, ELIZABETH BAIRD, NICOLE RICHARDS, PATRICK V. GIBBONS, FRANCES GIBBONS, FRANCIS A. McMANUS, MARK J. FARLEY, GARY J. FARLEY, ANNA FISCHER,

Petitioners,

vs.

LOWER MERION TOWNSHIP,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

Petitioners have invoked the jurisdiction of this Honorable Supreme Court pursuant to 28 U.S.C. § 1254(1).

On May 27, 1993, the United States Court of Appeals for the Third Circuit affirmed by way of judgment order the decision of

the United States District Court for the Eastern District of Pennsylvania granting summary judgment to respondent Lower Merion Township.

On August 25, 1993, petitioners filed a Petition for Certiorari which was rejected by this Honorable Court for failure to conform with Supreme Court Rule 33.1(c).

On September 10, 1993, petitioners re-filed the Petition for Certiorari with a properly prepared appendix and the petition was accepted out of time by the Court as conforming with the Rules.

STATEMENT OF THE CASE

On or about November 27, 1990, petitioners, a group of landlords and students, filed a Complaint against defendant Lower Merion Township challenging the constitutionality of Township Ordinance 3199. Thereafter in May 1991, petitioners filed an Amended Complaint asserting similar challenges. Respondent filed a Motion to Dismiss petitioners' right to travel, conspiracy and punitive damage claims and the district court granted the Motion on or about August 5, 1991. Petitioners' remaining claims asserted violations of the Fifth and Fourteenth Amendments of the United States Constitution.

Individually, petitioners can be defined as follows:

Student	**Rented Property**
Derek Smith	(South Ardmore)
Patrick O'Connor	(South Ardmore)
Luke Marrone	(South Ardmore)

Nicole Richards	(South Bryn Mawr)
Elizabeth Baird	(South Bryn Mawr)
Kristi Handler	(South Bryn Mawr)
Landlord	**Owned Property**
Patrick and Frances Gibbons	(South Ardmore)
Mark and Gary Farley	(South Ardmore & South Bryn Mawr)
Francis McManus	(South Ardmore)
Anna Fischer	(South Bryn Mawr)

The ordinance in question attempts to preserve the residential character of the communities in Lower Merion Township by regulating the development of group housing, including "student housing".

The preservation of the residential character of communities in Lower Merion Township was specifically acknowledged by the Township's Board of Commissioners in 1988 through its formation of the Residential Preservation Committee. This Committee was comprised of several commissioners, including Commissioner Calvin Drayer (former Vice-Chair) and Commissioner Ora Pierce (current Vice-Chair). Among the various issues considered by the Committee was the change in residential neighborhoods as the result of the uncontrolled development of land used for student housing. The Committee convened several public meetings with regard to the issue of student homes and these meetings were noticed to the community by publication in the Main Line Times.

Minutes of these meetings were kept and these reflect citizen participation and comments. The comments were audiotaped only and not recorded by a stenographer because these meetings were not official public hearings.

The Board of Commissioners of Lower Merion Township also conducted two public hearings on the student housing issue prior to enacting the predecessor Ordinance 3139 and several in 1990 before enacting the subject ordinance. These were official hearings, duly noticed, and all testimony and comments were transcribed. Residents as well as students and professors testified.

The areas in Lower Merion Township from which most complaints regarding student housing arose are the lower middle income areas of South Ardmore and South Bryn Mawr. Residents of these areas complained that student homes were disrupting the residential character of their communities because of excessive noise and parties in the evening and early morning hours (Appendix, *infra,* 37a-38a; 39a-44a; 44a-45a), illegal and legal parking of an excessive number of vehicles depriving residents of any on-street parking; unsafe and drunk driving, underage drinking and urinating and vomiting in public, and profuse littering.

The residents were very distraught that investors, whose intention it was to rent to students, greatly inflated the purchase price of homes in these lower middle income areas, hence precluding lower-middle income families from the possibility of purchasing homes. Rents charged to students averaged around $1,500 per month and ranged from $900-$2,000 per month for a three person occupancy. (30a-31a; 32a-36a). Some investors also required that their student tenants pay them a full year's rent plus one month's rent as security deposit in advance. These exorbitant rental prices were excluding families from the rental market. (41a-42a). Petitioner-landlord Fischer routinely requested one year's rent, plus one month's rent as security deposit, in advance. She

rents a twin home to three students at the rate of $1,650 per month plus utilities thereby requiring an up-front cash payment of $21,450. Ms. Fischer, like petitioner-landlords Patrick and Frances Gibbons, is strictly an investor. However, petitioner-landlords Gary and Mark Farley are real estate entrepreneurs whose self-employed business is comprised of purchasing homes in these lower-middle income areas, renovating them, thereafter obtaining a revised appraisal on the property (which is always more than the purchase price plus the renovation cost) and then borrowing the difference between the second appraisal and their total cost. (14a-18a; 19a-21a). This borrowed money is then used to purchase another property and the financial process is repeated. In the meantime, the property which was renovated is rented to students and the rental covers the first and second mortgages.

Throughout the debate regarding the student housing issue, the Board of Commissioners was in constant contact with Lower Merion's Police Department with regard to the problems of noise, parking, etc, associated with student homes. (5a-6a; 9a-11a). On several occasions, the police department responded to telephone calls from residents complaining of these problems and police reports were generated if the activity was observed by the police officer when he or she arrived on the scene (7a-9a). Several such police reports exist, however, they were not filed as exhibits since many of the complainants and persons cited are not parties to the instant action. The Commissioners also individually spoke with many concerned citizens regarding their experiences with student housing.

After considering (1) the findings of the Residential Preservation Committee; (2) the testimony of students, professors and township residents; (3) the police activity with regard to student housing; (4) information from the Zoning Enforcement Officer, Robert Duncan; (5) complaints from their individual constituents; and (6) personal experience, the Board of

Commissioners adopted Ordinance 3139 on February 15, 1989. Ordinance 3139 provided, among other things, zoning regulations for the use of residential property housing unrelated students.

Subsequent to the passage of Ordinance 3139, the Board of Commissioners and the Residential Preservation Committee conducted additional public hearings and the Residential Preservation Committee continued to receive information. Noteworthy is that many residents attended the zoning appeals of landlords challenging enforcement of the ordinance and testified with regard to their continuing concerns.

On July 19, 1990, the Board of Commissioners passed Ordinance 3199 which is the subject of the instant action. The Ordinance addresses various group housing issues and modified Ordinance 3139 with regard to some of the student housing zoning requirements.

In essence, Ordinance 3199 set forth amendments to Chapter 155 of the Code of the Township of Lower Merion which is the portion of the Code of the Township of Lower Merion pertaining to zoning. Chapter 155, along with the amendments of 3199, set forth separation, square footage, parking and density requirements for all structures which house more than three unrelated individuals. Each particular use has restrictions particular to the type of use, *i.e.* family day care centers must have a specific minimum square footage of outdoor play space per child, as well as a driveway to allow off-street pick up and drop off of children. A special exception permit is required for family day care, homes for the elderly, religious facilities, educational facilities, sorority and fraternity houses, lodges, clubs, hospitals, etc. as well as for student homes.

The Ordinance does not ban student homes but merely places distance, square footage, parking, and density restrictions on this

type of use. Those homes which were in conformance with the Code at the time Ordinance 3139 was enacted are deemed grandfathered. In February 1989, 66 homes were listed as grandfathered and now the number exceeds 120, not including individual units which are grandfathered in apartment complexes. The Township continues to grandfather units that landlords can establish were used for student housing prior to Ordinance 3139, and were in all other instances in conformance with the relevant Code. The "student housing" regulations of Ordinance 3199 do not apply to a unit occupied by related students or less than two students.

SUMMARY OF THE ARGUMENT

The district court and the court of appeals properly determined that petitioners failed to present a viable equal protection challenge to respondent's zoning ordinance by which the development of group homes in the Township was controlled. In passing the ordinance in question, the Township sought to maintain the residential character of the community, to cut down on noise and congestion, and to maintain property values at a level which could be afforded by the lower and middle income families of the community.

Zoning ordinances are to be upheld unless they are "clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals or general welfare." *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 385, 47 S. Ct. 114, 141 (1926). Since the restrictions placed on the unfettered development of student homes are rationally related to the promotion of the Township's stated goals, the ordinance is valid.

Further, the district court and court of appeals properly applied the rational relationship test in upholding the challenged ordinance. Petitioners' argument on the application of this Court's

holding in *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 105 S. Ct. 3249 (1985) is merely one of semantics. While denying that they are requesting some heightened form of review under *Cleburne,* petitioners assert that *Cleburne* requires a more detailed rational relationship analysis.

A review of *Cleburne* and subsequent cases applying the rationality test establishes that heightened review is not required. The *Cleburne* Court specifically determined that a more exacting standard of review is not called for when dealing with social legislation that does not involve a suspect or quasi-suspect class.

REASONS FOR DENYING THE WRIT

I.

THE JUDGMENT OF THE DISTRICT COURT AND ITS AFFIRMANCE BY THE COURT OF APPEALS ARE IN ACCORD WITH THE DECISIONS OF THIS HONORABLE COURT.

Petitioners have misapplied decisions of this Court and the various court of appeals in order to argue that the previous decisions rendered in this case are inconsistent with established case law. Petitioners ask the Court to create a novel application of the rational basis test so that they can attempt once again to recover.

A. This Court's holding in *City of Cleburne v. Cleburne Living Centers,* 473 U.S. 432 (1985) does not mandate a heightened rational basis test.

Petitioners' contention that this Honorable Court's holding in *Cleburne* established a more exacting rational basis test is contrary to the specific conclusions reached in *Cleburne.* In *Cleburne,* the municipality required a special use permit for a group home for the

mentally retarded while all other uses were not subject to this requirement. The asserted state interest in requiring such a permit was an unsubstantiated fear by residents that the mentally retarded would hurt them, devalue their property or that a flood would occur endangering the mentally retarded.

After the ordinance requiring the special use permit was upheld as constitutional by the district court, the Court of Appeals for the Fifth Circuit held that mental retardation is a quasi-suspect classification calling for a more exacting standard of review than is normally accorded economic and social legislation. On review by this Honorable Court, it was determined that this was error. Rather, this Honorable Court determined that "[t]o withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be *rationally related* to a legitimate governmental interest." *Cleburne,* 473 U.S. at 446, 105 S. Ct. at 3258 (emphasis added). "[T]he Equal Protection Clause requires only a rational means to serve a legitimate end." *Id.* at 442, 105 S. Ct. at 3255.

Applying the rational basis test, this Honorable Court concluded that there was no rational basis for believing a group home for the mentally retarded posed any special threat to legitimate state interests. This Honorable Court reviewed the reasons proffered in support of the challenged ordinance and found them not to be rationally related to a legitimate government purpose. No exacting review was applied.

The essence of petitioners' argument is that the Lower Merion ordinance should be held invalid because the *Cleburne* ordinance was declared invalid. However, as Justice Stevens observed in his concurring opinion in *Cleburne,* the rational basis test produces different answers not because a heightened or more exacting standard is applied but because the characteristics of the group involved in an equal protection challenge are sometimes relevant

and other times irrelevant to a valid purpose. *Cleburne*, 473 U.S. at 453-454, 105 S. Ct. at 3261-3262.

The facts of *Cleburne* are clearly distinguishable from those presented in the instant case. In *Cleburne*, a special use permit was required for a group home for the mentally retarded while all other uses were not subject to this requirement. In the present case, Lower Merion requires a special exception permit for the following uses in residential areas:

1. family day care;
2. homes for the elderly;
3. religious facilities;
4. educational facilities;
5. fraternities and sororities;
6. lodges and clubs;
7. hospitals; and
8. student housing.

Further, the asserted state interest in *Cleburne* was an unsubstantiated fear of residents that the mentally retarded would hurt them or their property or that a flood would occur endangering the mentally retarded. In the present action, Lower Merion was presented with police testimony and records confirming the excesses of the students such as unreasonable noise, illegal parking; drunk driving; underage drinking and littering. The Township was also presented with evidence that the inflated purchase prices of homes and monthly rental charges precluded

lower/middle income families from the market place. The Township based its decision on this hard data. Finally, *Cleburne* involved residents with the immutable characteristics of mental retardation. An individual's position as a student is one of choice.

Despite petitioners' arguments to the contrary, the court in *Bannum v. City of Louisville, Kentucky,* 958 F.2d 1354, 1358 (6th Cir. 1992), specifically found that the *Cleburne* Court had applied the most deferential level of scrutiny and had rejected the application of heightened scrutiny in the nature of social legislation. Likewise, in *Cornerstone Bible Church v. City of Hastings,* 948 F.2d 464, 471 (8th Cir. 1991), the court found that the rational basis test gives broad latitude to legislative initiatives concerning economic regulations. The district court and court of appeals properly applied the rational basis test to the facts of this case and determined that the challenged ordinance was constitutional. Petitioners have failed to present a viable issue to justify this Honorable Court's review.

B. Respondent Lower Merion Township's Ordinance regulating the development of student homes does not violate the equal protection clause.

Zoning ordinances carry with them a "presumption of rationality." *Hodel v. Indiana,* 452 U.S. 314, 331-32, 101 S. Ct. 2376, 2386-87 (1981). Therefore, the courts must give considerable deference to the interests pursued by the legislature in its zoning laws. Zoning ordinances must be upheld unless they are "clearly arbitrary and unreasonable having no substantial relationship to the public health, safety, morals or general welfare." *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 385, 47 S. Ct. 114, 141 (1926).

Under the guise of "the general welfare," this Honorable Court has permitted legislatures to pass ordinances to preserve

spiritual, physical, and aesthetic values, *Berman v. Parker,* 348 U.S. 26, 33, 75 S. Ct. 98, 102 (1954), to "enhance the quality of life," *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 128, 98 S. Ct. 2646, 2661 (1978), and to create zones where "the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas,* 416 U.S. 1, 9, 94 S. Ct. 1536, 1541 (1974).

To uphold the zoning ordinance at issue in the present case, the district court was merely required to find that the restrictions placed on the development of student homes was rationally related to the promotion of the public health, safety and welfare. If the district court determined that the rational relation of the zoning action to legitimate governmental interests was at least fairly debatable, it was bound to uphold the ordinance. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. at 464, 101 S. Ct. at 724.

In challenging the subject ordinance on equal protection grounds, petitioners argued that the ordinance was enacted solely to contend with a perceived behavioral problem among a class of individuals labelled "students." Petitioners allege that this classification treats students who are outstanding members of the community in the same manner as those students who create problems for their neighbors. Petitioners conclude that this classification is unreasonable.

The equal protection clause of the Fourteenth Amendment mandates that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." United States Constitution, Amendment XIV, § 1. This provision requires that "similarly situated" persons receive equal treatment from the government. *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439, 105 S. Ct. 3249, 3254 (1985).

Since petitioners challenge a state created classification under

the equal protection clause which does not affect "fundamental rights" or use a "suspect classification", the classification is presumed to be valid and is viewed under a rational relationship test. In making the requisite analysis, this Honorable Court must remember that "states are accorded wide latitude in regulating their local economies, and they may make rational distinctions or classifications among persons 'with less than mathematical exactitude.' " *DeSisto College, Inc. v. Town of Howey-in-the-Hills,* 706 F. Supp. 1479, 1498 (M.D. Fla. 1989) (citations omitted).

In passing the ordinance under consideration, the Township's goal was to preserve the residential character of the community. There is ample evidence in the notes from the Township's minutes stemming from hearings on the proposed ordinance that restrictions placed on the development of student homes was rationally related to this legitimate government interest. "The preservation of the character and integrity of single-family neighborhoods, prevention of undue concentration of population, prevention of traffic congestion and maintenance of property values are all legitimate purposes of planning and zoning." *Village of Belle Terre,* 416 U.S. at 1, 9, 94 S. Ct. at 1541. "The opposition of neighbors . . . is also a legitimate factor in legislative decision making." *Burns v. City of De Peres,* 534 F.2d 103, 110 (8th Cir.), *cert. denied,* 429 U.S. 861, 97 S. Ct. 164 (1976).

At the various public hearings concerned with this specific zoning ordinance, many residents of the Township testified that the student homes adversely affected the character of their communities. These residents testified to loud parties every weekend which lasted until 2:00 a.m., students trepassing on their properties, the playing of radios and stereos at excessive levels at all times of the day and night, the accumulation of litter especially beer bottles in the area of the student homes and the overflow of vehicle traffic and the lack of space for the parking of these vehicles. Additionally, residents complained that they, as lower-

middle income families, were being priced out of the housing and rental markets.

Based on this testimony, it is clear that the zoning regulations at issue are rationally related to legitimate goals. The rational basis test is not an exacting one and the facts presented to support the ordinance are sufficient if they "reasonably may be conceived to justify it" *McGowan v. Maryland,* 366 U.S. 420, 426, 815 S. Ct. 1101, 1105 (1961). Through the zoning ordinance in question, the Township sought to control the problems of parking, congestion, litter and the excessive noise. All of these problems are generated by student homes and their uncontrolled development. This Honorable Court may not "substitute its own judgment as to the wisdom or utility of legislative purpose for that of local legislatures." *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. at 468, 101 S.Ct. at 726.

> Th[is Honorable Court] has recognized the *key role that the zoning power can play in maintaining for citizens an acceptable quality of life*. Zoning is the local community's most powerful weapon against a wave of commercialism that threatens to permeate not only the major thoroughfares but the quiet residential neighborhoods with parks, trees and children at play. Without the power to zone, every person would be at the mercy of the entrepreneur who chose to develop on the next corner. *Zoning provides one of the firmest and most basic of the rights of local control.*

Stansberry v. Holmes, 613 F.2d 1255, 1288 (5th Cir. 1980) (emphasis added).

Further, the present zoning ordinance is reasonable. It does

not preclude the development of all student homes nor prohibit such a use of property in any area of the Township. Rather, the Township has merely placed restrictions on the unfettered development of such residences. The terms of the ordinance are specifically tailored to address the problems experienced by residents who live adjacent to or near student homes. The clustering of structures used as student homes turns residential communities into off-campus dormitories. The subject ordinance is a compromise between competing uses. It protects the student housing use and ensured that it can continue within the community but separates the student housing so that the community itself does not lose its residential fabric and become, in essence, a dormitory. The parking requirements of the ordinance are aimed at preventing students from taking the parking places of the residential neighbors on a regular basis, although the ordinance certainly does not address guest parking.

Student homes are permitted throughout the entire township and a substantial area exists for their continued development throughout the distant future. At some point, particular neighborhoods will become saturated, although that point is not mathematically determined and is certainly dependent upon several factors including the lapsing/extinguishing of units currently listed as student homes.

The saturation point, whatever it may be, is the protection that there will always be some market for lower-middle income families. Such families, and even some upper income families, cannot afford the exorbitant rents or advance cash payments in excess of $20,000.

In formulating this ordinance, the Township took great lengths to receive information from residents, investors, entrepreneurs and students. The issue was on the agenda of a specific subcommittee and public meetings and hearings were routinely held. In all

respects, this ordinance is the product of the great democratic process which this country cherishes and which this Court is to protect and give wide latitude. Parties on both sides of the issue are not fully satisfied, however, this is the essence of balancing competing uses.

The distinction between student homes and other permitted uses for residential rental properties in Lower Merion Township clearly serves the purpose of preserving the residential character of the Township. Student homes involve greater and more frequent movement of people and automobiles than ordinary residential homes in the Township. Further, the student homes cause greater noise and larger amounts of litter than would otherwise exist in residential areas. Therefore, it is at least fairly debatable that the legislation was rationally related to the purpose of preserving the residential character of the Township.

A rational lawmaker may determine that student homes are different enough from homes rented to unrelated individuals who are employed full-time in terms of hours kept, lifestyle, noise level and automobile use that a municipality may rationally distinguish among them in making decisions. Accordingly, the district court properly entered summary judgment in Lower Merion's favor and the court of appeals was required to affirm that decision.

C. Petitioner-landlords have no standing to challenge the Ordinance on equal protection grounds.

In reviewing the basis of petitioners' equal protection claim, it is clear that petitioner-landlords have no standing to pursue this cause of action. This group of petitioners is not part of the alleged class which is being challenged.

It is undisputed that a plaintiff may only pursue a claim for violations of his own constitutional rights. An individual may not

challenge an act or activity which allegedly violates the rights of other individuals. Therefore, petitioner-landlords have no standing to challenge the ordinance on the grounds that it unfairly classifies students. Petitioner-landlords are not part of this class.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

Excerpts Robert Duncan Testimony [Deposition pp. 84-85]

would be grandfathered in or not?

A. I did as zoning officer.

Q. And they were required to bring in certain documentation?

A. Generally they could bring in any information they wanted. Usually what we were looking for is a lease in effect at the time the ordinance was approved indicating the names of the individuals on the lease and then other documentation proving that those individuals were in fact students.

Q. And of the 150 homes or whatever, were they in the general areas of Bryn Mawr and Ardmore where the student housing problem as you described it was in existence?

A. Yes.

Q. And so those 150 homes or whatever, were they in the general areas of Bryn Mawr and Ardmore where the student housing problem as you described it was in existence?

A. Yes.

Q. And so those 150 homes are still in existence roughly?

A. I believe it is 120, yes.

Q. And so the neighborhoods that had complaints about the behavior of student housing, they still have to deal with these 120 or so student houses; correct?

A. Yes.

Q. And there is nothing in the new ordinance that addresses the behavioral problems of, say, the 120 existing student homes?

A. No, there has been no ordinance adopted which is now part of the zoning division. It is part of the crimes code that addresses any rental property and the behavior of the tenants.

Q. The homes that were grandfathered in, were any of those problem homes prior to the student housing ordinance?

A. Sure

Q. So those problem homes are still in existence?

A. I can't say that they are all still problems, but yes, those homes are still in existence.

Q. So the purpose of the student housing ordinance was to address student housing problems and student housing properties within certain areas of the township, basically Bryn Mawr and Ardmore?

A. It applies township wide.

Q. But the problem was arising in certain areas of Bryn Mawr and certain areas of Ardmore?

Appendix A

A. Major problems were South Ardmore and South Bryn Mawr.

Q. Within those areas the residents were complaining about particular properties and particular type of behavior coming out of those properties?

Excerpts Henry E. Hasson
[Deposition pp. 13-23]

A. We are very report-oriented in the police department and the officer is required to submit some sort of report basically on calls that they respond to where they take any type of action or have conversation with complainants, victims, subjects or anything else.

Q. Are there any specific criterion that they are supposed to use to determine whether a certain series of questions or certain information is required for their reports?

A. Have you seen our reports?

Q. I got them this morning.

A. There are blocks and the blocks are expected to be filled out. There is nothing in the blocks in the miscellaneous report, which would be the type of report that would be written on a disorderly conduct type of situation, which establishes occupation.

In most cases if the occupation is student, student is inserted. In another block the facility or the institution is put in there.

Q. Can you tell us what types of records are kept by your

department, for example, incident reports, accident reports? What categories of reports do you have?

A. Our reporting system is based on the UCR crime reporting system. Are you familiar with that?

Q. No, sir.

A. Briefly, the Federal Bureau of Investigation has established UCR for uniformed crime reporting that basically relates to Part 1 and Part 2 crimes, crimes of a more serious nature, and there are code numbers assigned to them from 0100, which is a homicide, up to 2200 series which goes through drinking violations, liquor law violations. 2400's are disorderly conducts. So that we code every incident that we respond to with the best appropriate code that we can get it into.

So I guess, to answer your question, we do keep records on just about everything that we respond to.

Q. Are there different categories of reports? For example, you have motor vehicle reports which would have a different classification.

A. They are on a motor vehicle accident report. Miscellaneous reports really is an all-encompassing report which basically covers those situations that don't fall in the other one. We have crimes versus persons, which is aggravated assaults, simple assaults homicides. We have burglary reports, property reports as such. We have theft of auto report, theft from auto reports and largely reports of theft; and basically everything else is covered on a miscellaneous.

Q. And are all of the records that you maintain under one records department?

A. They are.

Q. And obviously you are ultimately in charge of the department, but is there someone or a group of individuals who are assigned to recordkeeping?

A. Under my command there is a captain who has the responsibilities of the auxiliary services unit, auxiliary services division, and one unit within that division is the records section, and that records section is commanded by a lieutenant.

Q. Can you tell us what statistical records are maintained?

A. The staff and inspections division will maintain or has the ability, I guess, to compile any kind of statistical records we want. We don't really maintain specific statistical records unless there is a problem identified. However, we do have the ability to go back into, for example, accidents and say "Let's look at a specific amount of accidents at this time or this location." Unless there is an ongoing concern with that specific location, we don't routinely tab them as such.

Q. Are you familiar with the ordinance that was first discussed this morning, 3199, that was passed in July of 1990 regarding — do you have a copy of that?

MR. GREEN: Here.

A. I'm familiar with it. I'm not intimately familiar with it as such, but I'm familiar with it.

Q. Prior to the passage of that ordinance, did you receive a request from any committee or from the board of commissioners of Lower Merion Township to provide them with any statistical data relating to incidents involving students, well, any statistical data for use in their preparation of that ordinance?

A. I'm sure we did. I can't remember specifically at what time it would have happened or the specific contents of what we gave them, but this has been something that has been going on for probably at least five or six years at different phases, and depending on the concern, I guess, displayed by the community, that really gave us — did I say us? — the Township the ability I guess, or not the ability, but the interest in pursuing some of the statistical information. I would think that over that period of time there could have been several reports that would have been submitted with respect to the number of arrests for disorderly conduct underage drinking type of violations that would have been in fact attributable to students the best that we could determine at that time under the recordkeeping system that we had in fact in place.

Q. Is the recordkeeping system that you have now different that the recordkeeping system that you had five years ago?

A. It is somewhat, yes.

Q. And could you describe in what way it is different?

A. When I referred earlier to the 2400 series for disorderly conducts, at about the time that we got into this program which we refer to as community harmony—and I think that would have been October. I think I stated that before, in about October — we then devised a secondary code which would give us the ability to go

over and say that that disorderly conduct is directly related to a student home violations or a violation involving students.

Previously we would be able to say that we could query the computer and say give us all the 2400's in a certain geographical district which would encompass the areas of concern, maybe in Bryn Mawr, for example, but we would have to manually pull every report and go over it to see if there were students involved or whatever the situation was. So it was much more difficult to be able to break that down and get finite numbers on it.

Q. Did you testify before the committee or the board of commissioners with regard to this particular ordinance?

A. I don't believe so.

Q. Are you familiar with the predecessor ordinance, 3139, that was passed in February of 1989 relating to student housing?

A. Probably, but I would like to see it if you have it. I know there are some differences in it. I don't know them off the top of my head.

Q. Right here.

A. I'm aware of it, again not intimately familiar with it. The most compelling thing about student houses that was the easiest thing to remember was no more than three.

Q. Did you provide any statistical information to your recollection or did the department provide any statistical information to either any committee that was involved in the

preparation of that ordinance or to the board of commissioners with regard to that ordinance?

A. When you say with regard to that ordinance, could you be more specific?

Q. Sure. Did your department prepare any statistics or present any statistics to any committee or to the board of commissioners at or about the time that this ordinance was prepared?

A. The only statistics again to the best of my knowledge that we would have been putting in would have been dealing with arrests or with contacts.

Q. When you provided the estimate of the number of arrests, did you break that down to indicate whether these arrests occurred on the street, at a taproom, at a restaurant or at a residence?

A. They may have been broken down maybe more so informally than formally at that point. Again, the incident number is the identifying factor, and I know that some of the stuff, some of the in-house information that we were keeping at that time was a little bit more definitive. I'm just not sure exactly how much it was broken down to the point it got to the commissioners. For example, there was a lot of staff activuty, in-house staff activity, in presenting information related to that specific committee that would then be going in and dealing with another issue as far as we saw it. The issue here was we are looking at behavioral situations. That was playing a part of this overall building, I guess, of this ordinance, but that was the only impact that we had into it.

Q. If you were to go downstairs now and go to the computer, would you be able to get a statistical percentage of the number of

disorderly conduct citations that are issued that relate to student homes, registered student homes?

A. Not specifically. We would be able to get total numbers on students, and then we would have to pull the reports to find out if they emanated from the homes or from the local bars or whether they were just out on the street.

Q. So that right now the computer is set up simply to distinguish those incidents that involved students?

A. That's correct.

Q. As opposed to non-students?

A. That's correct.

Q. And are you able to tell us what percentage of disorderly conduct citations that are issued in Lower Merion Township, entire township, relate to students as opposed to non-students?

A. Over the calendar year of school year?

Q. Calendar year.

A. Calendar year there is a substantial amount. The amount substantially increases when you get into the school year.

Q. And when we are talking about students, are you limiting your definition of students to those who are attending colleges or university as opposed to those that are attending high school?

A. Yes. The code that we have that distinguishes student

homes or student activity does not apply to those that are not within the undergraduate level or up.

Q. Do you know offhand the percentage of disorderly conduct citations that are issued in the entire township for the entire year, for an entire calendar year? What percentage would be those that are thus defined as students?

A. I don't know that offhand.

Q. Do you recall ever providing that information to any township committee or to the board of commissioners?

A. Not in that form. I don't think we would have done it on a percentage basis, but I'm not sure of that.

Q. Do you know the number of residential rental units that have been approved by Lower Merion Township for lease to students?

A. No, sir.

Q. Has your department ever been provided with a list of the approved student properties?

A. Yes, I think we have, and I think it has been updated periodically.

Q. Do you know by whom you were provided this list?

A. By codes, codes department.

Q. Would that be Mr. Duncan?

A. It would be either he or one of his subordinates, yes.

Q. Can you tell us from your own understanding what constitutes a student home in Lower Merion Township?

A. A home occupied by students that go to college.

Q. That's the entire understanding?

A. Pretty much so.

Q. You say pretty much so. What else, if any other factors, is there?

A. A student home is a home that is occupied by college students, and I think it would have been deemed to be a student home if it were occupied by college students before we had the ordinance.

Q. And does the department keep a separate record of police calls or incidents relating to student homes?

A. Yes.

Q. And how long has it maintained a separate record?

A. Again, that goes back to past testimony. That was probably in about October or so of '90.

Q. At whose instruction was this category or reports created?

A. By mine.

Appendix A

Excerpts Mark J. Farley
[Deposition pp. 24-27; 80-82; 103-112]

Q. With reference to all your properties that you have had, are pets allowed?

A. At some properties pets are allowed. At the bulk of the properties, no, sir.

Q. Are utilities included at any of your properties?

A. Again, some are and some are not.

Q. I am going to go on an individual basis. With reference to the one we just discussed, which is 139 Simpson, are utilities included?

A. No.

Q. What was the initial rental figure for a month?

A. The initial rental was $825.

Q. Security deposit and how many months?

A. Again, I would have to check my records, but it varies between one month and two months.

Q. What's the current rental?

A. The current rental is $900.

Q. And just so I am clear and I can read that later —

A. And, again, I am going by the lease that was signed in August of '90.

Q. Is there a specific column that says the current rental?

A. Yes, "Monthly rent."

Q. Does that spell out chronologically how it changes?

A. Yes.

Ms. Woodie: Off the record

BY MS. WOODIE:

Q. I see. On that column it says, "1200." Had it gone up to 1200 at one point?

A. At one point.

Q. Just so I am clear, we have a nonstudent column on the right-hand side and a student column on the left-hand side?

A. Yes.

Q. You were getting the names from the non-students in the student column, right?

Mr. Morgan: No, tenant column.

Appendix A

The Witness: Tenant names.

BY MS. WOODIE:

Q. So the far left is the tenant names and the dates and the property addresses, the center column is students, far right is non-students?

A. Yes.

Q. We started out at $825, then dropped to $750?

A. Yes.

Q. Do you know why it dropped to 750?

A. Supply and demand.

Q. Then you went back up from 750 to 1200; is that correct?

A. Yes.

Q. And then down to 900?

A. Yes.

Q. Is this a licensed student home?

A. No, it's not.

Q. And have you applied for a license?

A. Yes, we have.

Q. Have you participated in any hearings regarding your application?

A. Yes, I have.

Q. Have you had a final resolution from the Lower Merion Township?

A. No, we have not.

Q. Let's move on to the next property, which is 69 Greenfield.

You started out renting to students?

A. My wife takes care of the rentals, but to the best of my recollection.

Mr. Morgan: Let's go off the record for a second.

BY MS. WOODIE:

Q. Can you describe for me the property at 69 Greenfield?

A. It's a triplex with one apartment on each floor.

Q. You purchased it in 1987?

A. Yes.

Q. When you purchased it, was anybody living in it?

A. Yes.

Q. Who was living in it?

A. A single male on the third floor, a family on the second floor, and a husband and wife on the first floor.

Q. So it was originally a triplex when you purchased it?

A. Yes, it was. It's licensed as a triplex now. And the electric is split out as a triplex.

Q. Did any of these tenants continue on after you purchased the property?

A. No.

Q. Did you do any renovations after you purchased the property?

. . .

A. Two sisters with children.

Q. With their own children?

A. Yeah.

Q. And they purchased it from you?

A. Yes.

Q. Was it ever advertised for sale?

A. No.

Q. What was the reason for your selling it to them? Did they approach you?

A. No. I approached the tenants.

Q. How much did you sell it for?

A. That sold for, again, approximately 85,000.

Q. How much had you purchased it for in '89?

A. Approximately 38,000.

Q. And can you estimate for me how much your renovations cost you?

A. Approximately fifteen to twenty thousand.

Q. Does that include labor?

A. No. That includes labor for the workers. It doesn't include my labor or Gary's labor.

Q. When you sold it to them, did you take back the mortgage?

A. No.

Q. Any particular reasons why you wanted to sell it?

A. Yeah; because when we initially bought it, we had anticipated getting the rent that we had originally, again $1500.

Then when we had to drop the rent down to $800, that just bearly covered the mortgage payments. That did not include taxes or anything else. We were actually losing money on it at that rent. So we were forced to sell it.

Q. What did you buy it at?

A. 30, 36, 38,000.

Q. How long of a mortgage did you have? How many years?

A. Thirty-year mortgage.

Q. And with the taxes and the renovations and the mortgage, it was close to $800?

A. Yeah. Upon completion of the work, we refinanced it. And that mortgage was basically based on an appraisal of 90,000 .

Q. So you use that money for other investment purposes?

A. Yes.

Q. Is that generally how you turn over your properties and can finance new purchases?

A. Yes.

Q. I assume that you have your purchase records and sale records for all the properties; is that right?

A. Yes.

Appendix A

Q. Now, the next is 320 Locust Avenue.

A. I would like to just point out that 142 Simpson Road was appraised for 98,000 when we bought it.

Q. In '89?

A. In '89.

Q. And you sold it for 85?

A. Yes.

Q. Did you have a reappraisal at any time?

A. When they bought the property, they had the property appraised.

Q. What was it appraised at then?

A. $100,000.

Q. Was it the same appraiser?

A. No.

Q. Is there any reason why you took 85 if it was appraised at 100?

A. As I stated before, it wasn't — the 800 was barely covering the mortgage payments, let alone maintenance and upkeep of the property.

Q. Did you at all consider advertising it for 100 or a little bit more than 100 to see if you could get that?

. . .

Q. How many bedrooms?

A. Four.

Q. How many stories?

A. Three.

Q. Does it share its driveway at all?

A. No; two-car garage.

Q. It's truly a single family home?

A. Yes.

Q. On a lot?

A. Yes.

Q. Let's move on to 34 West Spring. How far away is that from 323 West Spring?

A. Approximately two blocks.

Q. You purchased it in February of 1990?

A. Yes.

Appendix A

Q. Renovations were done to it?

A. Yes.

Q. Approximately how long did it take for renovations.

A. Approximately two or three months.

Q. Do you know how much it cost for the renovations?

A. 98,000.

Q. The renovations themselves?

A. Yes.

Q. How much did you purchase the property for?

A. 60.

Q. Did you get a reappraisal then?

A. Yes.

Q. How much was the reappraisal?

A. 215.

Q. Did you finance a second mortgage up to 215?

A. I refinanced the whole package.

Q. On 215?

Appendix A

A. Based on 215.

Q. When did you first put tenants in there? Would that be June '90?

A. Yes.

Q. Is it a licensed student home?

A. No.

Q. Were those three tenants in June '90 on the first floor Villanova students?

A. Yes.

Q. Full time?

A. Yes.

Q. Male, female?

A. Male.

Q. Did you break this up into apartments when you renovated it?

A. No. It was a duplex.

Q. How many bedrooms on the first floor?

A. The first floor has two.

Q. How many bedrooms on the second floor?

A. The second floor has one on the second floor and two on the third floor.

Q. I don't see a No. 3 on here. The second floor and the third floor are one together?

A. Yeah.

Q. Is it connected with a stairwell or anything?

A. Yes.

Q. So five total bedrooms, but the second floor and third floor together, which is the second floor apartment, have three?

A. Yes.

Q. What happened to the Villanova students on the first floor?

A. The township came by and again forced the tenants out.

Q. And they were paying you 1225?

A. Yes.

Q. What happened with regard to renting it after that?

A. We finally got it rented, but the rent dropped down to $700 for the first floor apartment and 895 for the second floor apartment.

Q. When they had both been at 1225?

A. Yes.

Q. Do you know if those tenants in the first and second floors moved out around the same time?

A. It's kind of tough to say. We didn't receive any rent.

Q. At all?

A. I am not sure. I can't really say because I don't take care of the rentals or the bookkeeping or rent checks. I am just going by what's here.

Q. Maybe I have been reading it wrong, but if you read what's here, it looks like you got it all.

A. We got it all, which is correct; but when they found out that they could not live in the property — they paid rent for the summer. They attempted to move in, I guess, maybe sometime in August. They were notified by the township that they couldn't move in, so we had to refund the rent money. So whatever we collected, we had to give back.

Q. So you netted nothing?

A. Netted nothing, but we lost the rent that we could have gotten if, perhaps, somebody else was in.

Q. And then it looks like in September and early October you rented those two apartments?

A. Yes.

Q. For the 700 and 895?

A. Yes.

Q. Is there some reason why you got 895 for No. 2 and only 700 —

A. The second floor apartment consists of the second and third floor.

Q. But before the second floor apartment was the same price as the first floor.

A. That's correct.

Q. Any reason why it was the same then?

A. It was just a matter of supply and demand.

Q. Just let me ask this question so the record is clear. The second floor was also Villanova students?

A. Yes.

Q. Male or female?

A. Male.

Q. Full time or part time?

A. Full time.

Q. They kind of moved in on the same day and have the same lease date?

A. Yes.

Q. Do they know each other?

A. Yes.

Q. They probably moved out about the same time too?

A. Yes.

Q. People that went into Apartment No. 1 in October 1990, Rafferty and Radd, were they students?

A. No.

Q. I assume then they are business people?

A. Yes.

Q. No. 2 was Bartolini and Lynch?

A. Yes.

Q. Now, had I seen those names before or am I really —

Gary Farley: 18 West Spring.

Ms. Woodie: Thank you.

The Witness: They moved from the second floor right down the street to 34 West Spring Avenue.

BY MS. WOODIE:

Q. And they are non-students?

A. Non-students.

Q. Had they moved to 18 West Spring?

A. Yes.

Q. And then when they left, did anybody go in their place?

A. Yeah; the girls in 211 Park Terrace.

Q. And it looks like they are now in 34 West Spring?

A. Excuse me?

Q. It looks like now they are at 34 West Spring?

A. They are.

Q. And they had come from 18 West Spring?

A. Yes.

Q. And then the Bartolini went in No. 2. I understand now. All

right. I had them going the other way, and I couldn't figure out —

A. Yeah. The girls went from 211 to 18 West Spring Avenue. The guys went from 18 West Spring Avenue to 34 West Spring Avenue.

Q. Did you ask them to do that?

A. Yes.

Q. Did you accommodate them on the price at all because they had done that?

A. No. Actually we raised their rents a little.

Q. And they are all merging together. Did I ask you what type of house this was; do you recall?

A. No; but it is a single family as opposed to a twin, with two apartments.

Q. So it's a single family with two apartments?

A. Yes.

Q. How many bedrooms in No. 1?

A. We are referring to 34 West Spring Avenue?

Q. Yes, we are.

A. We went through that, but the first floor you got two bedrooms, and the second and third floor you got three bedrooms.

Q. I thought we had.

A. When I say "single family," I mean detached.

Q. As opposed to a twin?

A. Yes.

Q. 339 West Spring, what type of property is that?

A. That's a twin.

Q. How many bedrooms?

A. Four.

Q. When you purchased it, was anybody living there?

A. No.

Q. How long had it been vacant?

A. I couldn't tell you.

Q. Was it more than a year?

A. No.

Q. Did you do renovations?

A. Yes.

Q. How extensive were the renovations?

Appendix A

A. We put in a new kitchen, new bathroom, spruced it up.

Q. Do you know how much your renovations cost you?

A. Fifteen to twenty thousand.

Q. Do you know how much you paid for it?

A. I believe we paid 75,000.

Q. And you told me it's sold?

A. Yes.

Q. For 85,000?

A. Yes.

Q. To the tenants?

A. Yes.

Q. Was that Reverend Hayward?

A. Yes.

Q. He was paying you $850 a month?

A. Yes.

Q. Did you get a reappraisal on this house?

A. Yes.

Q. And did you seek a second mortgage up to the amount of the reappraisal?

A. Yes.

Q. Do you recall how much the reappraisal was?

A. 115,000.

Q. How did the timing on that work? If you bought this in May '90, and it looks like the reverend moved in August '90, had you had your reappraisal at that point, and renovations had been done, and that was in the process?

A. The renovation work was done prior to the tenant moving into the property.

Q. Do you know whether the reappraisal came before —

A. Yeah. Right about probably — if the reverend moved in back in August, it was probably done in the middle of July or so.

Q. And then you would have borrowed the money at that point?

A. Yeah.

Q. Or soon thereafter?

A. Yes.

Q. The reason for selling that?

A. Again, the reason for selling that property, if we had been able to put — the money we were receiving just wouldn't cover the maintenance of the property and the upkeep.

Q. Did you approach him or did he approach you?

A. We approached him.

Excerpts of Anna Fischer's Testimony
[Deposition pp. 27-30]

Q. To your knowledge, were those four people unrelated, that is, there weren't any brothers or sisters?

A. To tell you the truth, I really didn't ask them whether they were. Now, there are two brothers who are living there, but I don't know whether one was a cousin or just what.

Q. Did they all have different last names of the four that signed?

A. Yes. They all did have different last names.

Q. And so I'm clear, you never inquired at any time whether or not they were students?

A. No.

Q. Did the rent go up at all from the 1650 you started with?

A. Yes. I started out with I think 1500, I believe.

Q. I thought you started at 1650.

A. No. In '88, it was only about $1500 and then in — let me see. In '90 was when I raised the rent to 1650.

Q. Now, did the four of those people move out because of anything with regard to Mr. Wiley or was it just that they were moving on?

A. Well, they knew that they couldn't stay there with the four and so they couldn't afford the rent. I had to get other tenants.

Q. Did they actually tell you that they had wanted to stay, but three of them couldn't make the 1500?

A. Right.

Q. Did you ever raise the rent while they were there?

A. I think I raised it $25 the second year because my interest rate had gone up from eight percent to ten percent.

Q. Did you collect your rent in separate checks or did you just get one check?

A. Just one.

Q. Did they have to pay for utilities?

A. Yes.

Q. Do you know approximately how much that runs in the winter?

A. No.

Q. Does that include heat?

A Yes.

Q. Now, when you went to Mr. Wiley to apply for a special exception, did you think that you were getting a special exception to keep students there?

A. Yes.

Q. Did you then think the people who had been in there were students?

A. Well, I figured that they were since they were young and that their parents had come down. So I imagined that they were students.

Q. Did you get a special exception license from Mr. Wiley?

A. Yes, I did. I got a license. Like I said, I paid the $5.00. Now, whether it's a special exception license — was it?

Mr. Malloy: No. You got a residential rental permit.

The witness: Oh, okay.

BY MS. WOODIE:

Q. And you hadn't had a rental permit before then?

A. No, because I didn't know that I needed one.

Q. How did Mr. Wiley come to bring that to your attention; do you know?

A. Well, I think that he was canvassing the area and he was knocking on doors.

Q. Did anybody tell you that?

A. Yes. The tenant that was in the house told me.

Q. In your house?

A. Yes.

Q. Then you registered it as a rental property?

A. Right.

Q. Then when is the next time you rented the property?

A. That June.

Q. What was the rental charge?

A. $1650.

Q. Do you recall who the tenants were at that time?

A. Yes, Chris Laurie and the other two names, I really don't know. I don't know who the other two names are.

Q. So Chris Laurie is one name?

A. Yes. He's the one that I dealt with most of all.

Q. And there were two other males?

A. Yes.

Q. Do you know whether that group was students?

A. Well, they also were young and I assumed that they were.

Q. Did you fill that out on your rental application that they were students?

A. My rental application?

Q. Well, every year you have to fill something out with the township; right? Did you know that?

A. No.

Q. Did Mr. Wiley give you a piece of paper to fill out?

A. No.

Q. Did you sign anything?

A. No.

Excerpts of Herbert L. Smith's Testimony
[Deposition pp. 26-28; 36]

Q. And the legal limit is three, is that correct?

A. That is my understanding. That is just one of the issues.

Q. How does that affect —

A. I would rather give them all to you then go back. There are general conditions created by student life that are a big headache with most of us not living the student life. Conditions that are created are episodic nature of student tenants. This is to say, students living in a house for two years and they have an academic/social calendar that intersperses with a lot of functions and give rise to drinking, parties and loud music etcetera. And most of these students, you know, like to live with their neighbors but they are also caught up in the student culture. The student culture places high emphasis on exhibitionist types of behavior. It wouldn't be appropriate if you or I were to do it now. For instance, if I gave a loud yell at this table. That might be kind of funny if we were all nineteen again, what is wrong with yelling? Except at 2:00 a.m., my kids tend to wake up and it is very hard to deal with these problems as they exist. Probably the case where they yell at 2:00 o'clock in the morning may be actionable under some kind of criminal complaint. It is virtually impossible to get a human being in the U.S. to get that enforced. Similar complaints with respect to speeding, driving the wrong way on a oneway street, general loud levels of noise and littering. It is very hard to attach to a discarded yellow beer cup, if the actual owner pursued this thing in criminal court, even in civil court yet these beer cups are there. When the students leave, I don't see the beer cups anymore. Again, based on using inference, I assume they come from the students. It is hard to get that enforced. As a practical matter, I have to deal with the fact that student homes are creating conditions that are very difficult for the residents of the neighborhood. As I stated, the episodic nature, the fact that the students come in and they are there for a year or two and then they leave, creates a problem. You know, by the time you

get socialized that you get them to understand what it is to be an adult in a nice neighborhoods and people have a chance to go to their jobs, they are gone. Just like that, like I say, calendars studded with activities which I assume you will remember from college and I certainly remember from college. This is the occasion of much revelry, nothing wrong with that except when it basically impacts on the neighborhood in an adverse fashion.

Now as a practical matter, what does this mean? I am a little richer than some people so I can put in air conditioning. Frankly, I don't have to worry about the fact that I can't keep the windows open in South Bryn Mawr, Ardmore area. This is a concern that I have stated and you probably read it in the testimony as well. I don't know how you would ever get that enforced in a criminal court. But, this is certainly something that people have to live with when there are too many students in an environment, one of a college campus. The interesting thing about college campuses, at least on a campus I got a little bit of control over the students. On-campus you have some control, but when the students are living off-campus, you have not the control of the usual campus that you would as administration on a college campus.

. . .

regarding student homes or ordinances pertaining to a specific amount of people but I did assume that there were because I had previously owned a home in Indiana near a University and was aware of their ordinances of so many people in a home. I wasn't paying too much attention with this business with my neighbors. But then I noticed that far more cars started piling up in the driveway.

Then September came around, maybe late August there was a

loud party, I remember going over there shaking with anger and accosting one of those young men. Not physically but verbally. I would say to them, you may have a family of your own some day and when they are growing up you will see what it is like to have all of this commotion. They were always apologizing and trying to make amends but I was still getting annoyed. I got annoyed at the parties, the loud music, the littering, slamming car doors, honking. I got annoyed that there was so many people there. I then start complaining to the township. The township then announced an inspection and then they moved all of these beds out of the house. I then got my neighbors Doug and Jerry Ross to go over to take a look so other people

Excerpts Rev. Michael Broken Borough's Testimony
[Deposition pp. 9-10; 33-37]

Q. We have had several depositions in connection with this case I have routinely referred to the issue before us as the Student Home Ordinance Issue, I believe that is fair to say. Ms. Woodie has objected for the record but —

Ms. Woodie: Which I will do again.

BY MR. GREEN:

Q. I do that for the purpose of brevity and I would say this, Reverend, if at any time during the deposition, that description of the issue is insufficient as far as you are concerned, let me know and I will be more specific. Does that meet with your approval, Ms. Woodie?

Ms. Woodie: That is fine, as long as I have my standing objection.

Appendix A

BY MR. GREEN:

Q. Have you had an occasion to observe students residing within South Ardmore?

A. Yes I have.

Q. They are college students?

A. Yes.

Q. Do they attend any particular university?

A. I have observed students that I am aware of that attend Haverford College and Villanova University.

Q. Have you observed problems with students who reside in your neighborhood?

A. I have observed what I would term as problems in the neighborhood that I reside.

Q. What kind of problems have you observed?

A. Problems such as making a lot of noise, that I would deem as being inappropriate hours, parking in private driveways that belong to other residents, use of profanity, urinating in the public and I have had students use abusive language to myself and my wife, and illegally parking where parking was not authorized, I guess that's it that's on the top of my head but more might come on later.

Q. You indicated urinating. Did you actually observe people urinating in public?

A. Yes.

Q. Where was that?

A. Also, drinking alcoholic beverages as well, underage drinking on Holland Avenue . . .

Q. I had asked you about the residential character of the neighborhood and I believe you did say the students were transient.

A. That is correct.

Q. But isn't that true of just about anybody who rents?

Ms. Woodie: Objection. Speculative.

The Witness: Well, spending thirty years in Ardmore, I have seen people who are renting homes for thirty years. I would not characterize that as being transient.

BY MR. GREEN:

Q. Where they are traditional families, they tend to stay?

A. Yes. They have raised their children in that community. Ardmore has basically been a community where people come and buy or rent and they stay there.

Q. Has anyone confided in you that he or she has been priced

out of the market in South Ardmore in terms of buying a property to live in?

A. Yes.

Q. Who was that person? If you recall.

A. I don't have names off the top of my head but through many discussions, people who are looking to buy homes could not afford to pay what was being asked. And also to rent, families who are looking to rent homes cannot afford to rent homes in the Ardmore area. A couple of years ago, you could rent a home in Ardmore for $250 or $300 a month. Properties now are being rented for at least $750 a month and a lot of the student properties are going for $1,400 to $2,000 a month.

Q. Are these single family dwellings?

A. Yes. I should say, twin houses are renting for $750 a month. The ones that are non-students, the ones who could not get a license for a student house, those are being rented for $750 a month. Student houses are going from anywhere between $1,500 to $2,000 a month.

Q. Now the homes that are renting for $750 a month, are they getting tenants?

A. They are sitting.

Q. And the properties that are available as student homes, are they getting tenants?

A. Yes they are.

Q. And the student homes are around $1,400 to $2,000 a month?

A. That is correct.

Q. But at $750 a month, the other properties, the non-student homes, are sitting idle?

A. Yes. Basically, it is investors who have bought the homes but with the advent of the township ordinance, prohibits them to rent out student homes, so now, you know, they are up for rent and they are sitting.

Q. Has any landlord approached you personally and offered to make available to you properties on a rental basis to reside at?

A. No landlord but realtors.

Q. Realtors have?

A. Yes.

Q. Which realtors, if you know?

A. Whitney Realtors.

Q. Have they been able to rent properties through your help to persons that you know?

A. No, because they cost too much money.

Q. They were too much money?

A. Yes. And, several properties that were for sale were bought by investors and they are sitting because, you know, it costs so much money.

Q. If the persons now living in the student homes on Holland Avenue were to drop out of Villanova University, and were not longer students, would that abate the problems that you described?

Ms. Woodie: Objection.

The Witness: I don't think they could afford the rent. I have had students personally tell me that the reason why they violated the number is because they can't afford to pay the kind of rent that the landlords are asking.

BY MR. GREEN:

Q. If the rents were reduced, would that abate the problems that you see along Holland Avenue?

Ms. Woodie: Objection.

The Witness: If the rents were reduced enough, I think it would abate the problem because then you could have families moving into those homes.

Q. And by families you mean persons who are related by marriage?

A. Yes, or basically, those who are, you know, who understand what it means to live in this kind of environment. It could very well be, you know, people who are professionals, you know, working and wish to live in a residential area.

Appendix A

Mr. Green: I have no further questions.

. . .

Excerpts Public Hearing on Ordinance
[Hearing Transcript pp. 60-61]

CELESTE LIBERATOSCIOLI:

Celeste Liberatoscioli, same sister. Students say they want to be part of the community, they want to — understanding and all. Well, the first thing they do, when they moved on Roosevet Terrace two years ago, they didn't come over and say hello, we're Villanova students, we're going to move here, we're going to be good.

They partied three days, three nights, urinating out windows, screaming at the top of their lungs, smashing bottles. I mean carrying on.

Three days, I don't know why I put up with it three days. Seems like every time one of these properties turns into a student house, the first year that's what happens. It happened to my friends on County Line Road. Three days and nights. These kids aren't stupid. I'm sure you have to have brains to get into Villanova. They know they are disturbing people.

If their thing is to be a part of the community, they say they've been talking years about this, why are we going through this every year? Every time there's a new house, they — they know what they're doing. It's outrageous, and they don't want to be neighbors. They're there to study and they sleep, that's it. Only time we see

them is when they use the playground. They're not neighbors, they're just renting a house to go to school.

And I would rather see those homes with people that have been living there for years.

And that man is wrong when he says the blacks are being thrown out now. My family has lived in Ardmore 40 years. The blacks are being thrown out now for these students. We're seeing families move out that have been there fore years. And that stinks.

If they were quiet, if they were going to be truly part of the neighborhood, fine, but

PUBLISHER'S NOTE:

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